134
No. 09-132
Supreme Court, U.S.
FILED
JUL 24 2009
OFFICE OF THE CLERK

In The Supreme Court of the United States

SCOTT WINFIELD DAVIS,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Georgia

PETITION FOR WRIT OF CERTIORARI

MCNEILL STOKES
1040 Peachtree Battle Avenue
Atlanta, Georgia 30327
Telephone: (404) 352-2144
Facsimile: (404) 367-0353

Attorney for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTION PRESENTED FOR REVIEW

Whether sustained interrogation intentionally questioning first at a police station before giving Miranda warnings in order to obtain admissions without telling the suspect that he was free to leave violated the Fifth and Fourteenth Amendments of the United States Constitution?

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

INDEX TO APPENDIX iv

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

STATEMENT OF THE FACTS 5

REASONS FOR GRANTING THE PETITION .. 12

SUSTAINED INTERROGATION INTENTIONALLY USING QUESTIONING FIRST PRACTICES AT A POLICE STATON WHERE THE SUSPECT WAS NOT TOLD THAT HE COULD LEAVE BEFORE GIVING MIRANDA WARNINGS IN ORDER TO OBTAIN ADMISSIONS VIOLATE THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITION.....17

CONCLUSION.....26

APPENDIX TABLE OF CONTENTS

Decision of the Supreme Court of Georgia, April 28, 2009 ..... A-1

Order on Motion for New Trial of Superior Court of Fulton County, Georgia, September 10, 2008 ..... A-15

TABLE OF AUTHORITIES

CASES **PAGE**

Berkemer v. *McCarty*, 468 U.S. 420 (1984).....23

California v. Beheler, 463 U.S. 1121 (1983)..... 23

Davis v. State, 285 Ga. 343 (2009)..... 5

Jackson v. Denno, 378 U.S. 368 (1964).....3

Miranda v. Arizona,
384 U.S. 436 (1966).....3, 4, 5, 22

Missouri v. Seibert, 542 U.S. 600 (2004)
.....3, 4, 5, 13, 15, 17, 18, 19, 17, 18, 19

Oregon v. Elstad, 470 U.S. 298 (1985).....16

Oregon v. Mathiason, 429 U.S. 492 (1977).....22

Stansbury v. *California*, 511 U.S. 318 (1994).
.....23, 24, 25

Thompson v. *Keohane*, 516 U.S. 99 (1995).....24, 25

United States v. *Hubbell*, 530 U.S. 27 (2000).....22

United States v. Naranjo,
426 F.3d 221 (3rd Cir. 2005).....15

United States v. Ollie,
442 F.3d 113 (8th Cir. 2006).....16

United States v. Pacheco-Lopez,
531 F.3d 420 (6th Cir. 2008).....13

United States v. Patane,
542 U.S. 630 (2004).....21, 24, 25

United States v. Stewart,
191 Fed. Appx. 495 (7th Cir. 2006).....14

United States v. Street, 472 F.3d 1298
(11th Cir. 2006).....14, 19

United States v. Thompson,
496 F.3d 807 (7th Cir. 2007).....13

Yarborough v. Alvarado,
541 U.S. 652 (2004.....22, 24

OPINIONS BELOW

The Decision of the Supreme Court of Georgia, April 28, 2009, affirming the conviction of the Petitioner is set forth in Appendix A-1. The Order on Motion for New Trial of the Superior Court of Fulton County, Georgia, September 10, 2008, denying Motion for New Trial is set forth in Appendix A-15.

JURISDICTION

The final judgment of the Supreme Court of Georgia was rendered on April 28, 2009. The statutory provision conferring jurisdiction on the Supreme Court of the United States to review on a writ of certiorari is 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT V · . . . nor shall any person . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

AMENDMENT XIV. SECTION I · ...nor shall any State deprive any person, of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws; nor deny to any person within its jurisdiction equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was indicted by the Grand Jury of Fulton County, Georgia for one count of malice murder and five counts of felony murder on November 18, 2005 for the homicide of David Coffin (R. 4-12). At a pre-trial motions hearing, the trial court granted Petitioner's motion to quash two of the felony murder counts on March 17, 2006.

Counsel for Petitioner timely filed a Motion to Suppress seeking to exclude statements that had been elicited from Petitioner by police homicide detectives under intensive and prolonged interrogation throughout the night on December 11, 1996 when he was taken to the police station in a squad car by uniform police and underwent many hours of interrogation by homicide detectives who did not warn him as required by *Miranda v. Arizona*, 384 U.S. 436 (1966) until after they had obtained damaging oral admissions and a written statement. Then the detectives gave the Petitioner Miranda warnings and proceeded to take an audio recorded statement going over the same admissions that had been previously obtained during the pre- warning session in violation of *Missouri v. Seibert*, 542 U.S. 600 (2004).

A *Jackson v. Denno*, 378 U.S. 368 (1964) hearing was conducted by the trial judge in the Superior Court of Fulton County, Georgia where the trial judge ruled that the pre-warned statements and

post-warning statement would be admissible because the Petitioner was not "in custody."

On December 8, 2006 Petitioner was convicted in a jury trial at which the both pre-warned oral admissions and written statement as well as the post-warned audio statements were introduced at trial over the objections of counsel for Petitioner that they should be excluded in accordance with the constitutional precedents of *Miranda v. Arizona* and *Missouri v. Seibert*. Petitioner was sentenced to serve life in prison for malice murder on December 8, 2006. (R-1752-1754).

A timely Motion for New Trial was filed on December 8, 2006 (R. 1752-1754) and an Amended Motion for New Trial was filed on July 31, 2007 raising, *inter alia*, grounds that the court had permitted the statements to be introduced in evidence at the Petitioner's trial in constitutional violation of Petitioner's *Miranda* rights as instructed in *Missouri v. Siebert*. The Motion for New Trial was denied on September 10, 2008 by Order on Motion for New Trial. (Appendix A-15).

Appeal was taken to the Supreme Court of Georgia raising the enumeration of error, *inter alia*, that the trial court erred when it denied Petitioner's Motion to Suppress and allowed introduction of Petitioner's oral and written statements as well as audio recorded statements which were obtained in violation of *Miranda v. Arizona* and *Missouri v.*

Seibert. The Supreme Court of Georgia in *Davis v. State,* 285 Ga. 343 (April 28, 2009) affirmed the conviction of the Petitioner summarily disposing of the grounds raised by *Missouri v. Seibert* that Petitioner was not "in custody." (Appendix A-1, at A-12-13).

STATEMENT OF FACTS

Petitioner had reported being attacked by an intruder firing shots the same night, December 11, 1996, that David Coffin was killed and his house set on fire. Coffin was having an affair with Petitioner's estranged wife and his wife called him to report that Coffin's house had been set on fire and he had been shot in the head which she also reported to at least two other people that night.

Petitioner was transported to the police station where he was intensively interrogated by homicide detectives and was not advised of *Miranda* warnings until after several hours of interrogation. After the interrogators obtained what they considered damaging admissions from him, only then did they give him the required *Miranda* warnings and proceeded to take audio recorded statements going over the same questions and similar answers. During the initial interrogation, without *Miranda* warnings, Petitioner gave an oral statement to Detective Chambers which the detective typed up. (T. 2661--2664). Alter giving this written statement, Detective Chambers continued to

interrogate Petitioner along with Detective Walker. (T. 2665). Hours into interrogating Petitioner, Detective Chambers advised Petitioner in writing of his *Miranda* rights. (T. 2670). This signaled the beginning of the second interrogation (T. 2671). During this second interrogation Petitioner was recorded by audio taped statement. (T. 2670). This second interrogation was simply a continuation and repeat of the first interrogation. (T. 2672-2673). Detective Chambers testified that he asked Petitioner the same questions in the second interrogation that was audio taped as he did when there was no recording. (T. 2672-2673).

Detective Chambers admitted that the question first of a suspect "digging for information" before giving *Miranda* warnings was standard operating procedure for the homicide unit in 1996. (T. 2550). Law enforcement clearly used a two-step questioning procedure when they interrogated Petitioner. Detective Chambers conducted the first part of the interrogation by questioning Petitioner alone and typing up Petitioner's responses. Next, Detective Walker and Detective Chambers questioned Petitioner together. During this part of the interrogation, they paused to give Petitioner written *Miranda* warnings and began to audio tape the interrogation. (T. 2670). The detectives asked Petitioner the same questions, only this time they recorded his responses. (T. 2672-2673). There was no significant break between the interrogation sessions and thus no curative steps were taken by the

detectives to cure the harm to Petitioner.

Due to Detective Chambers' strategy of interrogating Petitioner first to obtain a written statement and admissions from Petitioner, then giving *Miranda* written warnings to Petitioner, then continuing the interrogation with audio taped statements from Petitioner, all of Petitioner's statements should have been suppressed by the trial court. Law enforcement took no curative steps to protect Petitioner's constitutional rights being coercively interrogated at the homicide police station and never told him that he was free to leave. The sole purpose of both interrogations of Petitioner was to elicit admissions from Petitioner, followed by written warnings of his *Miranda* rights, then make sure Petitioner repeated his confession on tape. This is unconstitutional and the trial court should have excluded all of Petitioner's statements from trial.

During a pre-trial *Jackson-Denno* hearing, the prosecution contended that Petitioner initially gave a voluntary, non-custodial statement to the police and later that night provided a *Mirandized* statement to the police. The trial court held that the statements were voluntary and admissible. (T. 395-402). At trial, the statements were introduced through the testimony of Detective Rick Chambers. (T. 2536-2341I, 2543, 2568, 2570, 2372). Detective Chambers read Petitioner's written statement, over Petitioner's objection, to the petit jury. (T. 2536-2541). Over Petitioner's objection, the audio tape

recording of Petitioners statement was played for the petit jury. (T. 2543, 2568, 2570, 2372).

At the hearing on the Motion for New Trial, additional evidence was developed on this issue that Detective Chambers version — or perhaps it should be said 'versions' — of what occurred that evening demonstrate that a substantial portion of Petitioner's statement was provided after he became the prime suspect, but before the decision was made to give him *Miranda* warnings. (T. 2535, 2541, 2544). The chronology of events the night of December 11, 1996, was essentially as follows:

2:55 a.m.	Petitioner is taken by uniform police in a squad car to homicide police office.
3:00 a.m.	The initial interview of Petitioner began in a homicide interrogation room where he was constantly interrogated and not allowed to leave. (*Jackson-Denno*_hearing, p.37, T. 2528-2529).
3:32 a.m.	Homicide Detective Chambers testified that the question and answer session, which he typed which had information about Coffin at the end. (*Jackson-Denno* hearing, p. 38-42; T. 2534,

2663). Petitioner was not told that he could leave at any time Petitioner had no means to leave since he was taken to homicide by police car.

3:45 a.m. Detective Chambers came back into interrogation room and began to aggressively interrogate claiming that the Petitioner killed Coffin, but still not giving *Miranda* warnings.

4:00 a.m. Petitioner made a statement that he did not know who shot Coffin and Chambers testified that Petitioner was now the prime suspect, but they still do not give *Miranda* warnings. Petitioner claims that his wife told him that he had been shot and two other witnesses testified that his wife told them that night that Coffin had been shot. (T. 2663, 2674).

5:00 a.m. *Miranda* waiver is signed. (*Jackson-Denno* hearing p. 49; T. 2671). They start taping the interview repeating the same questions as previously asked prior to *Miranda* warning.

6:30 a.m. Petitioner asks for an attorney and the interview ends. There are only 50 minutes on the tape because the tape was being stopped and started.

6:45 a.m. Petitioner was finally allowed to leave and driven by detectives back to his house who continued to interrogate him and looked around his house.

Prior to the hearing on the Motion for New Trial, Detective Chambers had never previously acknowledged that a statement had been obtained from Petitioner that preceded the signed *Miranda* waiver, but after he had become the prime suspect. At the hearing on the New Trial Motion, however, he acknowledged that he had, in fact, questioned Petitioner after he became a suspect and before the signed waiver was obtained. (See Motion for New Trial Transcript dated January 11, 2008, pages 53-57). Having acknowledged that this statement occurred prior to the signed waiver, Detective Chambers testified, for the first time, that he actually provided two *Miranda* warnings to Petitioner, one orally (prior to the 4:00 a.m. statement) and then the written waiver, which is clearly marked as having been signed at 5:00 a.m. At trial and at the original *Jackson-Denno* hearing, there was no mention of a preliminary oral advice of

rights and waiver that preceded the un-taped 4:00 a.m. statement. (T. 2536-2541). Based on Detective Chambers' contradictory version of when (or if) Petitioner was *Mirandized* when he gave the untaped statement directly impacts the *Missouri v. Seibert* analysis that was dismissed during pretrial litigation. The facts are clear that Petitioner was induced to make an un-*Mirandized* statement with what the detective believed was a damaging admission, and only then promptly *Mirandized* followed by the same questions to elicit the same answers which was a *Seibert* violation. The fact that Detective Chambers, after testifying two times previously, and after he was trapped on cross examination that the written waiver given was after the detectives obtained the damaging admissions and only then did he claim that there was an additional prior oral *Miranda* warning which he never revealed, is cause to doubt his credibility and confidence in the *Jackson-Denno* Order.

What is certainly established is that the extended interrogation was all an integrated interrogation of the Petitioner as the prime suspect from the start and that the detective intentionally withheld *Miranda* warnings until after they obtained what they considered damaging admissions and then in the middle of the interrogation they gave him the constitutional required warnings followed by the same repeated questions to get the admissions recorded after the *Miranda* warnings.

REASONS FOR GRANTING THE PETITION

This Petition for Writ of Certiorari presents an opportunity for the United States Supreme Court to focus on the continuing practice of law enforcement to intensively question a suspect for an extended period of time without officially stating that the suspect is in custody and only giving *Miranda* warnings after obtaining admissions of the suspect followed by repeat of the same questioning to get a statement post *Miranda* warnings. This case squarely presents the practice that the Supreme Court has constitutionally forbidden in *Missouri v. Seibert*, supra, where the Petitioner was continually interrogated and only received *Miranda* warnings after the interrogating officer had obtained what he considered the smoking gun admission that the Petitioner stated that the victim had been shot which the Petitioner contended that he heard from his wife that night.

The Supreme Court of Georgia misinterpreted the teachings of *Missouri v. Seibert* ruling that a suspect must be officially in custody for *Miranda* and *Seibert* to apply, "because Davis was not in custody when he gave his statements, there was no violation of *Miranda* or *Seibert*." (Appendix A-13). The Supreme Court of Georgia did not address the law enforcement practice of avoiding *Miranda* and *Seibert* by not officially placing the suspect in custody and avoiding Miranda warnings until after damaging admissions and confessions are obtained

in a police interrogation that had the same ear marks of an in custody interrogation at the police station and the suspect is not told that he can leave at any time.

Further, there are conflicts in the circuits concerning when a suspect is "in custody" when law enforcement question first and then give Miranda warnings given that *Missouri v. Seibert* was a plurality decision subject to a number of different interpretations so that guidance of the Court to the circuits as well as to the states would be useful to give direction to provide certainty.

The Sixth Circuit has reached the opposite result from the Supreme Court of Georgia in the instant case. In *United States v. Pacheco-Lopez,* 531 F.3d 420 (2008) instructing that an interrogation at the kitchen table with a suspect while his house was being search pursuant to a search warrant was held that the "Miranda-in-the-middle" questioning to be the type of interrogation that is impermissible and compelled the conclusion that the subsequent Miranda warning was ineffective and that his statements were thus the result of a single, unwarned sequence of questioning. Further, the circumstances suggested a finding that the coercion carried over into the post-Miranda statement.

The Seventh Circuit in *United States v. Thompson,* 496 F.3d 807 (2007) reached the opposite result from the Sixth Circuit holding that

interrogating a suspect for three hours in his living room was not an impermissible in custody interrogation where the police questioned first and warned latter after they obtained their desired admissions. However, the Seventh Circuit in *United States v. Stewart*, 191 Fed. Appx. 495 (7th Cir. 2006) instructed that the District Court must consider whether a police department had an official policy endorsing "two-step" interrogation or provided training in which its officers were instructed to employ such a technique are potentially relevant to the broader question of officer intent but by themselves are by no means dispositive of the issue of whether police officers intentionally used a two-step interrogation in deliberate circumvention of *Miranda* in a particular case. The threshold matter for determination under *Seibert* in the Seventh Circuit is whether the officers intentionally withheld *Miranda* warnings as part of a deliberate strategy to elicit inculpatory statements in circumvention of *Miranda*; such an interrogation strategy might be used in a given case in the absence of an official policy requiring its use.

The Eleventh Circuit in *United States v. Street*, 472 F.3d 1298, 1314 (2006) explained the holding of *Seibert* citing Justice Kennedy's opinion explaining that: "suppression of a post-warning confession is required if 'the two-step interrogation technique [is] used in a calculated way to undermine the *Miranda* warning.' *Seibert*, 542 U.S. at 622, 124 S. Ct. at 2616. That means that if an officer employs

a strategy of deliberately questioning an in-custody suspect without any *Miranda* warnings in order to get a confession, planning to later warn the suspect and get him to repeat his confession, the post-warning confession is inadmissible unless the officer took specific curative steps to ensure that the mid-interrogation warnings achieved the purpose the *Miranda* decision intended. *Id.* at 621, 124 S. Ct. at 2615-16. The curative measures required are a 'substantial break in time and circumstance between the pre-warning statement and the *Miranda* warning' or 'an additional warning that explains the likely inadmissibility of the pre-warning custodial statement.' *Id.* at 622, 124 S. Ct. at 2616. Curative measures are necessary only where the 'question first' tactic has been used."

The Third Circuit in *United States v. Naranjo*, 426 F.3d 221 (3rd Cir. 2005) took an approach that because there was a plurality of opinions in *Missouri v. Seibert* that only the most narrow common element should be followed and consequently followed Justice Kennedy's opinion that agreed that the question-first policy was designed to "circumvent *Miranda*, undermining the *Miranda* warning and obscuring its meaning." *Id.* However, the Third Circuit Opinion stated that Justice Kennedy believed that could only be determined through objective inquiry from the perspective of the defendant, and that such an inquiry applies to "both intentional and unintentional two-stage interrogations." Justice Kennedy would therefore

have applied "a narrower test" that would apply only where "the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning." Where the two-step interrogation was not deliberately employed as a tactic, the Third Circuit opined that Justice Kennedy believed that the analysis should still be governed by *Oregon v. Elstad*. *Id.* It is submitted that *Missouri v. Seibert* superseded *Oregon v. Elstad*, 470 U.S. 298 (1985).

The Eighth Circuit in *United States v. Ollie*, 442 F.3d 113 (8th Cir. 2006) reversed the District Court in failing to suppress a confession obtained by a "question first warn later" tactic where the suspect was being interrogated by the chief parole officer and the defendant testified that he felt obligated to follow his parole officer's orders. Given the circumstances, a reasonable person would have believed that the officer had control over the interview that any attempt to terminate the interview could have resulted in a revocation of his parole.

SUSTAINED INTERROGATION INTENTIONALLY USING QUESTIONING FIRST PRACTICES AT A POLICE STATION WHERE THE SUSPECT WAS NOT TOLD THAT HE COULD LEAVE BEFORE GIVING MIRANDA WARNINGS IN ORDER TO OBTAIN ADMISSIONS VIOLATE THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

In the Petitioner's case police armed and in uniform took him to the police station in a squad car to homicide and interrogated him all night until 5:00 AM in the morning before giving him the required *Miranda* warnings and they did not tell him that he could leave nor did he have a means to leave. The Georgia Supreme Court decision in his state appeal interpreted *Missouri v. Seibert* to require that he must have been in custody and did not consider that he was in de facto custody as well as that the detective only warned him after the police obtained the admissions and telling him that his wife denied informing him that the victim had been shot in the head. But other witnesses verified that his wife also told them that night that the victim had been shot in the head. And most importantly he was in a continuous interrogation similarly to *Seibert* in a police station interrogation room where the same homicide officer intentionally questioned him first to obtain admissions, then warned him and after being warned recorded statements were taken employing

identical questions to elicit similar answers and admissions.

Miranda conditions the admissibility at trial of any custodial statement on prior warning of a suspect of his rights: failure to give the proscribed warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained. In *Missouri v. Seibert,* supra, the United States Supreme Court dealt with what the Court referred to as a "two stage" or "question first" interrogation procedure in which police first question a suspect without administrating *Miranda* warnings, gain a statement from the suspect, then administer Miranda warnings, and subsequently have the suspect repeat that which the suspect has already related, often with little interruption in time. The Supreme Court has noted in *Missouri v. Seibert,*. supra, that in such circumstances, it is unlikely that the *Miranda* warnings will effectively advise a suspect of his rights. The threshold issue when interrogators question first and warn later is whether it would be reasonable to find that under the circumstances that the warnings could function "effectively" as *Miranda* requires. Unless the warnings could place a suspect who has just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda* or for treating the second stage of interrogation as distinct *from* the first, unwarned and inadmissible segment. When Miranda

warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and deprive a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.

By the same token, it would ordinarily be unrealistic, to treat two parts of integrated and proximately conducted questioning as independent interrogations subject to independent evaluation simply because *Miranda* warnings formally punctuate them in the middle. *Missouri v. Seibert*, supra, outlined a series of relevant facts that bear on whether Miranda warnings delivered midstream could be effective enough to accomplish their object: the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first.

If an officer employs a strategy of deliberately questioning an in-custody suspect without any *Miranda* warnings in order to get a confession, planning to later warn the suspect and get him to repeat his confession, the post-warning confession is inadmissible unless the officer took specific curative steps to ensure that the mid-interrogation warnings achieved the purpose the *Miranda* decision intended. See *United States v. Street*, 472 F.3d 1298 (11th Cir.

2006). The curative measures required are a substantial break in the time and circumstance between the pre-warning statement and the *Miranda* warning or an additional warning that explains the likely inadmissibility of the pre-warning custodial statement. Voluntary statements made by unwarned suspects in custodial interrogation are presumed to be compulsory and are inadmissible at trial. Failure to administer *Miranda* warning creates a presumption of compulsion. Consequently, unwarned statements must be excluded from evidence under *Miranda*. By parody of reasoning the question-first tactic effectively threaten to thwart *Miranda's* purpose of reducing the risk that a coerced confession would be admitted, the post warning statements should also be inadmissible. Police strategists dedicated to draining the substance out of *Miranda* should not be condoned to accomplish what the Court has previously constitutionally forbidden.

Justice Souter in the plurality opinion in *Seibert* reasoned that, "unless the warnings could place a suspect who has just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment." Justice Souter further explained:

> By any objective measure, applied to

> circumstances exemplified here, it is likely that if the interrogators employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content. After all, the reason that question-first is catching on is as obvious as its manifest purpose, which is to get a confession the suspect would not make if he understood his rights at the outset; the sensible underlying assumption is that with one confession in hand before the warnings, the interrogator can count on getting its duplicate, with trifling additional trouble. Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again. supra, at 613.

United States v. Patane, 542 U.S. 630 (2004) involved a situation where the suspect was questioned at the door of his home leading to discovery of physical evidence of a hand gun in his home in violation of a felon in possession of a fire arm. The plurality decision did not turn on whether the suspect was in custody, but on "the core protection afforded by the Self-Incrimination Clause

is a prohibition on compelling a criminal defendant to testify against himself at trial." supra, at 637. Citing *United States* v. *Hubbell,* 530 U.S. 27 (2000) (Thomas, J., concurring) (explaining that the privilege might extend to bar the compelled production of any incriminating evidence, testimonial or otherwise). Justice Souter writing for three of the four dissenting Justices points out that "the issue actually presented today is whether courts should apply the fruit of the poisonous tree doctrine lest we create an incentive for the police to omit *Miranda* warnings, see *Miranda v. Arizona*, 384 U.S. 436 (1966), before custodial interrogation" and that the Court should not be "closing their eyes to the consequences of giving an evidentiary advantage to those who ignore *Miranda*, the plurality adds an important inducement for interrogators to ignore the rule in that case." *Patane,* supra at 646.

Miranda warnings are not only required for "in custody" interrogations where a suspect is arrested but also when the suspect is detained as instructed in *Yarborough v. Alvarado*, 541 U.S. 652 (2004), "custody must be determined based on how a reasonable person in the suspect's situation would perceive his circumstance." There is a series of cases after *Miranda* which provide guidance that *Miranda* should apply even though a person is not deprived of his freedom where the interrogation is inherently coercive.

After *Miranda*, the Court first applied the custody test in *Oregon v. Mathiason*, 429 U.S. 492

(1977) where during a thirty minute interview a suspect admitted his guilt who had voluntarily come into the police station and was not under arrest. In the next case, *California v. Beheler*, 463 U.S. 1121 (1983), the Court opined that the "circumstances of each case must certainly influence the custody determination" but reemphasized that the ultimate inquiry is whether there is a formal arrest or restraint of movement.

The more recent cases instruct that custody must be determined based on how a reasonable person in the suspect's situation would perceive his circumstances. In *Berkemer* v. *McCarty*, 468 U.S. 420 (1984), a police officer stopped a suspected drunk driver and asked him some questions. Although the officer reached the decision to arrest the driver at the beginning of the traffic stop, he did not do so until the driver failed a sobriety test and acknowledged that he had been drinking beer and smoking marijuana. The Court held the traffic stop non-custodial despite the officer's intent to arrest because he had not communicated that intent to the driver. "A policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time," the Court explained. "[T]he only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Ibid.*

Stansbury v. *California*, 511 U.S. 318 (1994) *(per curiam)*, confirmed an objective analytical

framework explaining that "the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Id.*, at 323. Courts must examine "all of the circumstances surrounding the interrogation" and determine "how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action." *Id.*, at 322.

Finally, in *Thompson* v. *Keohane,* 516 U.S. 99 (1995), the Court offered the following description of the *Miranda* custody test:

> Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." 516 U.S., at 112.

The recent case of *Yarborough v. Alvarado*, supra, as well as *United States v. Patane*, supra,

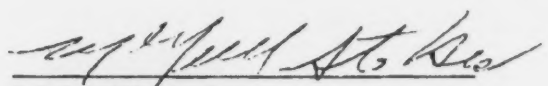
have indicated that a factorial analysis should be made in each circumstance. Justice Beyer in a four Justice dissent put the question in terms of federal law's well-established legal standards: "would a 'reasonable person' in Alvarado's "position" have felt he was "at liberty to terminate the interrogation and leave"? Citing *Thompson* v. *Keohane*, 516 U.S. 99, 112 (1995); *Stansbury* v. *California* 511 U.S. 318, 325 (1994) *(per curiam).* A court must answer this question in light of "all of the circumstances surrounding the interrogation."

This Petition presents an ongoing issue of current interest with which at least five Justices have concurred in *Seibert* and four Justices have concurred in dissenting opinions in *Patane* presents an opportunity for the Court to revisit and clarify the constitutional law in which the practice of law enforcement kicked a hole by questing first without officially taking the suspect into custody but nevertheless engaging in inquisitorial interrogation without telling the Petitioner that he was free to leave and by taking the Petitioner to the homicide police station in a squad car put the Petitioner in a situation where he had no means by which he could leave. This Petition presents yet the most recent practice of law enforcement to avoid the constitutional requirements of *Miranda* for the Court to consider.

CONCLUSION

It is submitted that granting this Petition for Writ of Certiorari will give the Supreme Court a plenary opportunity to give direction to the overuse of question first then warn tactics before providing *Miranda* warnings and avoiding technically placing the suspect in custody and to put meaning in the Fifth and Fourteenth Amendment protections.

Respectfully submitted,



McNeill Stokes
1040 Peachtree Battle Avenue
Atlanta, Georgia 30327
Telephone: (404) 352-2144
Facsimile: (404) 367-0353
Attorney for Petitioner
Scott W. Davis

No. _____

In The Supreme Court of the United States

SCOTT WINFIELD DAVIS,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Georgia

APPENDIX

MCNEILL STOKES
1040 Peachtree Battle Avenue
Atlanta, Georgia 30327
Telephone: (404) 352-2144
Facsimile: (404) 367-0353

Attorney for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

SUPREME COURT
OF THE STATE OF GEORGIA

Date: April 28, 2009

Case No. S09A0395 285 Ga 343

DAVIS v. THE STATE.

CARLEY, Justice.

A jury found Scott Winfield Davis guilty of malice murder and two counts of felony murder. The trial court entered judgment of conviction on the malice murder, and sentenced Davis to life imprisonment. The felony murder verdicts were vacated by operation of law. *Malcolm v. State, 263 Ga. 369, 372 (4) (434 SE2d 479) (1993).* The trial court denied a motion for new trial, and Davis appeals. *

* The homicide occurred between December 9 and 10, 1996 and the grand jury returned an indictment on November 18, 2005. The jury found Davis guilty on December 4, 2006, and the trial court entered judgment on December 8, 2006. That same day, Davis filed a motion for new trial. An amended motion for new trial was filed on July 31, 2007, and denied on September 10, 2008. The notice of appeal was filed on October 8, 2008. The case was docketed in this Court on November 21, 2008, and oral argument was held on March 9, 2009.

1. Construed most strongly to support the verdict, the evidence shows that after two years of marriage,

Davis' wife filed for divorce and moved out of the couple's home. Davis, who did not want to get divorced, threatened to kill anyone who had a sexual relationship with his wife. Davis' wife subsequently began dating David Coffin, and Davis hired a private investigator to follow her. Davis asked the investigator to locate Coffin's home address and telephone number, and after the investigator provided the information to him, Davis said that he was going to drive by Coffin's residence during the next weekend. That Saturday night, Coffin's house was burglarized, and his car was stolen. During the burglary, a call was made from Coffin's home to Davis' house, and later that night Davis made repeated calls to his wife's apartment, asking if she was sleeping with Coffin.

Two days after the burglary, Davis called in sick to work, and sometime that night, Coffin was fatally shot inside his house. The next morning, Coffin's car and other items stolen from his home were found burning near a MARTA station. A gas can and bag found inside the burning car were identified as being similar to items owned by Davis. That night, Coffin's house was destroyed by arson, and his body was found inside.

That same night, Davis made false reports to the police about having twice been attacked by an unidentified assailant at his own house, claiming one attack before, and another attack after, the fire at Coffin's home. During his statement to police about the alleged attacks, Davis said that he knew Coffin had been shot. However, at that time, the police did not know Coffin had been shot due to the charred condition of his body. It was not until the autopsy was later performed that the cause of death was

revealed to be a gunshot wound to the head. A few days later, Davis attempted to establish an alibi for himself by asking a neighbor to say that he had seen Davis at a gym on the night of the murder. The evidence is sufficient to authorize a rational trier of fact to find Davis guilty of murder beyond a reasonable doubt. *Jackson v. Virginia, 443 U.S. 307 (99 SC 2781, 61 LE2d 560) (1979).*

2. Davis claims that the trial court improperly allowed the State, during closing argument, to elicit sympathy from the jury and inject religion into the case by dimming the lights and calling for a moment of silence. However, Davis' claim does not accurately reflect what occurred at trial. The record reveals that the prosecutor merely asked the jurors to remember the victim, after which the lights were dimmed as pictures of the victim, which had been introduced into evidence, were displayed. This did not constitute a call for a moment of silence or an improper religious reference. See *Millen v. State, 267 Ga. App. 879, 885 (600 SE2d 604) (2004)* (on Motion for Reconsideration) (no improper invitation to base verdict on religion). Moreover, because the photographs were properly admitted as evidence in the case, it was not inappropriate for the State to display them during closing argument. See *McPherson v. State, 274 Ga. 444, 453 (19) (553 SE2d 569) (2001)* (no error for State, during closing argument, to display photographs of the victim in life that had been admitted at trial). Even if the argument could be construed as an attempt to evoke sympathy, "[a]rgument which evokes sympathy . . . is not necessarily improper." *James v. State, 270 Ga. 675, 680 (12) (513 SE2d 207) (1999).* See also *Dupree v. State, 267 Ga. 38, 40 (3) (472 SE2d 299) (1996)*

(not error for a prosecutor to point out victim's family in the courtroom). Furthermore, any purported harm was cured when the trial court instructed the jurors that they could only consider the evidence and the law as charged, and that sympathy for the victim and his family should play no role in their verdict. See *Harper v. State, 249 Ga. 519, 535 (14) (292 SE2d 389) (1982)* (no reversible error where, after State's alleged attempt to elicit sympathy during closing argument, court charged jury that sympathy could play no role in their determination of guilt or innocence).

3. Davis contends that the trial court improperly charged the jury on the law of a party to a crime when there was not any evidence to support such a charge. Contrary to this contention, the trial court did not charge the jury on the substantive law of party to a crime. Rather, the court's instruction on the defense of alibi included the following:

> Presence of the defendant at the scene of the crime alleged, or the defendant's involvement as a co-conspirator or as a party to the crime, is an essential element of the crimes set forth in this indictment, and the burden of proof rests upon the state to prove such beyond a reasonable doubt.

This brief mention of party to a crime within the alibi instruction "appears to be no more than a passing general reference . . . ." *Francis v. State, 266 Ga. 69, 72 (3) (463 SE2d 859) (1995).* Moreover, a review of the charge as a whole shows that the trial court fully instructed the jury as to the crimes charged, the presumption of innocence, the defense

of alibi, and the State's burden of proof. Within the context of the entire jury charge, it is highly probable that the passing reference to the term "party to the crime" did not contribute to the verdict, and therefore any impropriety was harmless. See *Richards v. State, 251 Ga. 447, 449 (1) (306 SE2d 302) (1983)* (incidental use of the word "confession" in the jury charge did not contribute to the verdict); *Green v. State, 240 Ga. App. 650, 652 (2) (523 SE2d 632) (1999)* (passing reference to prior difficulties in jury charge was harmless error).

4. Davis argues that two witnesses for the State were improperly allowed to give their opinions about the ultimate issue in the case. Greg Gatley, who was Davis' neighbor, testified that he "believed [Davis] was involved in this murder at some point." Later, a detective testified that his investigation revealed that no one other than Davis had a motive to kill the victim.

With regard to Gatley's testimony, the trial court denied Davis' motion for a mistrial, but sustained his objection to the testimony, struck the testimony from the record, and gave the jury a curative instruction to disregard it. The grant or denial of a motion for a mistrial lies within the sound discretion of the trial court, which will not be disturbed on appeal unless it was manifestly abused. *Hunt v. State, 268 Ga. App. 568, 572 (2) (602 SE2d 312) (2004).* In the instant case, "'[g]iven the trial court's curative efforts . . . and the lack of apparent prejudice, we find no abuse of discretion in the denial of [the] motion( ) for mistrial.' [Cit.]" *Smith v. State, 271 Ga. 507, 508 (3) (521 SE2d 562) (1999).*

As for the detective's testimony, Davis "did not raise [an ultimate issue] objection at trial, and is therefore procedurally barred from raising the issue on appeal. [Cit.]" *Huntley v. State, 271 Ga. 227, 230 (5) (518 SE2d 890) (1999).* Moreover, even if Davis had raised such an objection, it is without merit because the detective's testimony concerned only the issue of motive, which was not the ultimate issue in the case. "Inasmuch as the [detective] was not opining on the ultimate issue of fact and the jury was free to conclude that the [detective] was incorrect, this enumeration presents no grounds for reversal. [Cit.]" *Johnson v. State, 266 Ga. 380, 384 (3) (467 SE2d 542) (1996).*

5. Davis contends that the private investigator hired by him was part of his divorce legal team, that all communications between him and the private investigator are thus protected by the attorney-client privilege, and that the trial court therefore erred in denying his motion in limine to bar the private investigator from testifying about his communications with Davis regarding the victim's home address. However, as the trial court recognized in denying the motion in limine, this issue has already been decided adversely to Davis in a prior appeal.

When the private investigator was subpoenaed to testify before the grand jury, Davis filed a motion to quash the subpoena based on attorney-client privilege. The trial court denied the motion, and the Court of Appeals affirmed that denial on the basis that the subject communications fall within the crime-fraud exception to the privilege, which provides that "the attorney-client privilege does not extend to communications which occur before

perpetration of a fraud or commission of a crime and which relate thereto. [Cit.]" *In Re Fulton County Jury Proceedings, 244 Ga. App. 380, 382 (535 SE2d 340) (2000).* This Court denied Davis' petition for certiorari from the Court of Appeals' ruling, which is "binding in all subsequent proceedings in [the] case in the lower court and in the Supreme Court or the Court of Appeals as the case may be." *OCGA § 9-11-60 (h).* Accordingly, the trial court did not abuse its discretion in denying the motion in limine. See *Thompson v. State, 277 Ga. App. 323, 324 (2) (626 SE2d 825) (2006)* (denial of motion in limine reviewed for abuse of discretion).

6. Davis also claims that the attorney-client privilege protected a letter written by the private investigator and two letters written by his attorneys, and therefore the trial court erred in failing to exclude those letters from evidence.

> The attorney-client privilege protects communications between the client and the attorney that are intended to be confidential; the protection does not extend to communications which are not of a confidential nature. [Cits.] . . . Nor does the privilege cover the mere fact of employment. [Cits.] Indeed, the statutes outlining the attorney-client privilege are not broadly construed; the attorney-client privilege embodied in *OCGA § 24-9-24* has been confined "to its narrowest permissible limits." [Cit.] "Inasmuch as the exercise of the privilege results in the exclusion of evidence, a narrow construction of the privilege comports

> with the view that the ascertainment of as many facts as possible leads to the truth, the discovery of which is the object of all legal investigation." [Cit.]

Bryant v. State, 282 Ga. 631, 636 (4) (651 SE2d 718) (2007).

In the instant case, the three letters did not involve any communications between Davis and his attorneys. Rather, they were all communications between the private investigator and the attorneys. Moreover, the letters did not contain confidential information, and instead concerned only the fact of the investigator's employment and the attorneys' claims that the investigator's services in the divorce case fell under the attorney-client privilege. Because the letters do not contain confidential communications between Davis and his attorneys, they are not protected by the narrowly construed attorney-client privilege. See *Weakley v. State, 259 Ga. 205 (2) (378 SE2d 688) (1989).*

7. Davis argues that the trial court erred in allowing the State to make improper closing arguments that the defense had attempted to silence the private investigator. The State based such argument on the letters sent between the private investigator and the attorneys, and since the letters were properly admitted into evidence, the State was authorized to draw inferences, and make deductions, from them during the closing argument. "'(T)his Court has long held that the permissible range of argument during final summation is very wide.' [Cit.] . . . '[Moreover,] it is permissible for counsel to draw deductions from the evidence regardless of how illogical or unreasonable.' [Cit.]" *Perry v. State, 232*

Ga. App. 484, 487 (2) (c) (500 SE2d 923) (1998). Nevertheless, even if the argument went beyond the permissible range, given that the trial court instructed the jury that evidence does not include closing arguments by the lawyers, and given "the overwhelming evidence of appellant's guilt, we conclude it is highly probable that [any] error in this instance did not contribute to the judgment against appellant, and thus was harmless. [Cit.]" *Head v. State, 276 Ga. 131, 136 (6) (575 SE2d 883) (2003).*

8. Davis asserts that the trial court violated the continuing witness rule by permitting various documents, including letters, photographs and a death certificate, to go out with the jury during deliberations.

> "In Georgia, the continuing witness objection is based on the notion that written testimony is heard by the jury when read from the witness stand just as oral testimony is heard when given from the witness stand. But, it is unfair and places undue emphasis on written testimony for the writing to go out with the jury to be read again during deliberations, while oral testimony is received but once." [Cit.] The types of documents that have been held subject to the rule include affidavits, depositions, written confessions, statements, and dying declarations. [Cit.]

Adams v. State, 284 Ga. App. 534, 536 (2) (644 SE2d 426) (2007). "These documents, which generally contain their makers' assertions of purported truths, [cit.] are ascribed evidentiary

value only to the extent that their makers are credible." *Bryant v. State, 270 Ga. 266, 271 (3) (507 SE2d 451) (1998).*

In this case, the challenged exhibits were not written testimony and did not derive their evidentiary value solely from the credibility of their makers. Instead, they were original documentary evidence, and were properly allowed to go out with the jury. See *Bryant v. State, supra* (3) (death certificate showing fact of death not subject to continuing witness rule); *Bollinger v. State, 272 Ga. App. 688, 692 (2) (613 SE2d 209) (2005)* (letters not written testimony and thus continuing witness rule not violated); *Kenney v. State, 196 Ga. App. 776, 777 (2) (397 SE2d 131) (1990)* (photo lineup properly permitted to go out with jury).

9. Davis claims the trial court erred in denying his motion to dismiss the indictment based on the State's loss or destruction of exculpatory evidence.

> "'In dealing with the failure of the state to preserve evidence which might have exonerated the defendant, a court must determine both whether the evidence was material and whether the police acted in bad faith in failing to preserve the evidence. [Cit.] To meet the standard of constitutional materiality, the evidence must possess an exculpatory value that was apparent before it was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. [Cits.] "'Unless a criminal defendant can show bad faith on the part

> of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.' [Cits.]"

Milton v. State, 232 Ga. App. 672, 678-679 (6) (503 SE2d 566) (1998).

In his motion to dismiss, Davis challenged the loss or destruction of a handgun, a bullet and its casing, a tassel from a hat, two gas cans, a plastic bag, a shotgun, a knife, a flashlight, a key and a telephone caller identification unit. Other than the tassel and one of the gas cans, all of the other items were found either in the victim's burned car or home, and were generally not suitable for forensic testing because they had been damaged by fire and doused with water. Furthermore, any testing that was conducted on the items was preserved at trial by witness testimony. In any event, Davis has failed to show that any of the items were exculpatory. See *Pickens v. State, 225 Ga. App. 792, 799 (5) (484 SE2d 731) (1997).* Moreover, there is no evidence that the State acted in bad faith.

> Even if we were to assume that the State's "handling of the [items] (indicated) careless, shoddy and unprofessional investigatory procedures, (it did) not indicate that the police in bad faith attempted to deny [Davis] access to evidence that they knew would be exculpatory." [Cit.]

Jackson v. State, 258 Ga. App. 806, 810 (3) (575 SE2d 713) (2002). Accordingly, the trial court did not err in denying the motion to dismiss the

indictment. See *Walker v. State, 264 Ga. 676, 678-681 (3) (449 SE2d 845) (1994).*

Davis also challenges on appeal the loss or destruction of various items that were not contested in his trial court motion, including a fingerprint card. However, by failing to contest the loss of those items in the trial court, Davis has waived any such challenges. See *Roseberry v. State, 274 Ga. 301, 304 (3) (553 SE2d 589) (2001).* Moreover, even if the challenges were not waived, they are without merit due to the lack of any showing that the State acted in bad faith. See *Walker v. State, supra.*

10. Relying on *Missouri v. Seibert, 542 U.S. 600 (124 SC 2601, 159 LE2d 643) (2004),* Davis claims his statements to police should not have been admitted into evidence. Davis' reliance on *Seibert* is misplaced.

> In *Seibert,* the officers arrested the accused, subjected her to custodial questioning, obtained a confession, and only then complied with the mandate of *Miranda [v. Arizona, 384 U.S. 436 (86 SC 1602, 16 LE2d 694) (1966)].* Thereafter, a signed waiver was obtained from the arrestee and she gave a second confession. Under these circumstances, the Supreme Court of the United States held that both statements were inadmissible, concluding that "it would ordinarily be unrealistic to treat two spates of integrated and proximately conducted questioning as independent interrogations subject to independent evaluation simply because

> *Miranda* warnings formally punctuate them in the middle." [Cit.]

Wiggins v. State, 280 Ga. 627, 629 (2) (a) (632 SE2d 80) (2006).

The circumstances in the instant case are materially different from those in *Seibert.* Davis voluntarily went to the police station in order to give a statement about his own claims that he had twice been assaulted. After completing his initial statement, the police suspected that Davis might be involved in the victim's murder. Although Davis was not taken into custody, at that point he was informed of his *Miranda* rights, which he waived in writing. Davis continued to speak to detectives, and eventually asked for an attorney. All questioning immediately ceased, and Davis was driven home by detectives. "'Where an accused is neither in custody nor so restrained as to equate to a formal arrest, any statements made to an investigating officer are made under noncustodial circumstances and *Miranda* warnings are not required.' [Cit.]" *Durham v. State, 281 Ga. 208, 209 (2) (636 SE2d 513)(2006).* Because Davis was not in custody when he gave his statements, there was no violation of *Miranda* or *Seibert*, and the trial court did not err in allowing the statements into evidence. See *Grayer v. State, 282 Ga. 224, 228-229 (3) (647 SE2d 264) (2007).*

Judgment affirmed. All the Justices concur.

CONCUR BY: Sears

CONCUR

Sears, Chief Justice, concurring.

It has long been the law of Georgia, in keeping with that of other United States jurisdictions, that the attorney-client privilege "includes, by necessity, the network of agents and employees of both the attorney and client, acting under the direction of their respective principals, to facilitate the legal representation." [1] I do not read anything in Division 6 of the majority opinion to signal a retreat from this principle. [2] With that understanding, I join the Court's opinion in full.

1 Paul S. Milich, Georgia Rules of Evidence § 21.3 (2d ed.). See *Taylor v. Taylor, 179 Ga. 691, 692-693 (177 SE 582) (1934); Fire Ass'n of Philadelphia v. Fleming, 78 Ga. 733, 738 (3 SE 420) (1887).* See also 1 Paul R. Rice, Attorney-Client Privilege in the United States § 5:5 (2d ed.) ("Both the attorney and the client can be represented by third parties who serve as their agents. Communications from these individuals are afforded the same protection as communications from the individuals they represent or assist.") (citation omitted).

2 See majority opinion at 347, observing that "[i]n the instant case, the three letters did not involve any communications between Davis and his attorneys," but instead "were all communications between the private investigator and the attorneys."

FILED SEPT. 10, 2008

IN THE SUPERIOR COURT OF
FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA:

v.

INDICTMENT NO:
05SC37460

SCOTT DAVIS,
Defendant.

JUDGE TOM
CAMPBELL

ORDER ON MOTION FOR NEW TRIAL

On November 17, 2005 Defendant Scott Davis was indicted for the offenses of malice murder, felony murder (by aggravated assault) felony murder (by burglary), felony murder (by possession of a firearm during the commission of a felony) and felony murder (by arson) for the 1996 death of David Coffin. Prior to trial the Court granted Defendant's demurrer to counts three and five, felony murder by burglary and arson, respectively.

Beginning October 23, 2006 and concluding December 4, 2006, Defendant Scott Davis was tried before a jury and found guilty of malice murder, felony murder (by aggravated assault) and felony murder (by possession of a firearm during commission of a felony). After merging the felony

molder counts into malice murder, the Court sentenced Scott Davis to life in prison.

In addition to general grounds, Defendant argues in his Amended Motion for New Trial that the Court erred as follows: allowing the lead detective to impermissibly comment on Defendant's invocation of his Constitutional right to counsel; allowing the prosecution to comment on the pre-trial and trial tactics of Defendant's counsel; permitting the prosecution to elicit sympathy during closing through dimming the lights and requesting a moment of silence; erroneously charging. the jurors on the law of party to a crime and sending the instruction, in writing, out with the jury; allowing the prosecution to read an appellate opinion to the jury; permitting witnesses to give their opinion of Defendant's guilt; erroneously denying Defendant's motion to exclude his written and audio taped statements; erroneously denying Defendant's motion in limine to exclude the testimony of Investigator Daws; permitting the use of evidence which had been lost or destroyed; excluding evidence of the victim's positive cocaine postmortem toxicology screen; violating the continuing witness rule; failing to find that the delay from arrest to trial violated Defendant's due process rights; allowing a grand jury tape to be played when the actual evidence was not preserved; admitting evidence of Defendant's alleged prior bad acts; and permitting the prosecution to offer testimony of the deceased through hearsay testimony. Defendant further alleges that his conviction should be reversed because the prosecution improperly listened to non-

court proceedings to capture privileged communications between Defendant and his counsel.

The motion came on regularly for a hearing on December 16, 2007. Following the hearing, the record remained open until January 31, 2008. The Court set February 7, 2008 and February 28, 2008 for the filing of supplemental and reply briefs, respectively On June 26, 2008, Defendant filed a Supplement Brief on the Preservation of Evidence Issue.

Prior to the start of Defendant's trial this Court entered an order pursuant to Rule 22 of the Uniform Superior Court Rules allowing the recordation of the proceedings. One media outlet, CBS, was designated as the "pool" and permitted to install equipment in the courtroom for the benefit of each petitioner that was granted a Rule 22 order. All parties were informed of the specific location of the microphones prior to the start of trial. At the request of counsel all media microphones were removed from counsel tables.

Unbeknownst to the Defendant or the Court, the District Attorney had a media feed to his office. During jury deliberations it further came to the Court's attention that the courtroom microphones continued to transmit during times the court was in recess. Defendant contends his conviction should be reversed because the District Attorney eavesdropped and captured privileged conversation with his counsel. The Court does not agree.

There is no evidence in the record that the District Attorney heard any privileged conversations. Further, Defendant did not have an expectation of privacy in an open courtroom.

During direct examination the investigating detective testified that Defendant advised he wished to have an attorney. Defendant correctly states that the fact that he invoked his right to counsel may not be used against him at trial. *Durden V. State*, 250 Ga. 325 (3), 297 SE2d 237 (1982). However, the detective's statement was made during a narrative of course of events and the Court promptly gave a curative instruction.

Likewise, the testimony of State witness Greg Gatley that he believed Defendant was "involved with" Coffin's murder was promptly cured by an instruction to the jury to disregard this opinion. The Court further finds that Detective Chambers did not invade the province of the jury with an opinion of Defendant's guilt.

The Court finds no harm or prejudice to Defendant from any alleged "personal attacks" on Defendant's counsel.

During closing argument the lights were dimmed for the purpose of allowing the State to display a PowerPoint presentation. At that time the State displayed photographs of the victim which had been admitted into evidence. The State further asked the jury to take a moment and remember the victim. Defendant moved for a mistrial. Following denial of Defendant's motion, the Court instructed

the jury that sympathy should not play a role in its decision.

Defendant's allegation that the Court improperly instructed the jury on party to crime; erroneously sent out written instructions with the jury; and erroneously permitted evidence to go out with the jury in violation of the continuing witness rule are without merit, The Court finds that the jury was properly instructed and Defendant has failed to establish any violation of the continuing witness rule.

Defendant's several allegations regarding the admissibility of certain evidence are likewise without merit. The State used an appellate opinion in its examination of Defendant's divorce attorney regarding his understanding of the law of attorney-client privilege. The door to this line of questioning was opened by Defendant and the State's use of the opinion was permissible.

The Court having conducted a pre-trial hearing and having found they were freely and voluntarily made, Defendant's statements to the Atlanta Police Department were properly admitted Further, Investigator Daws' testimony was properly admitted after a finding that Defendant's communications to Daws were not privileged.

The Court conducted an extensive pre-trial hearing on the State's failure to preserve evidence in this case. There was absolutely no bad faith found on the part of the State. Upon review of the entire record the Court further finds that the lost evidence

was only potentially useful". Defendant's due process rights have not been violated and the missing evidence is not a basis for reversing Defendant's conviction. See *State v. Brady*, 287G. App. 626, 653 S.E.2d 72(2007). The Court also properly admitted tbe grand jury tape after the laying of a proper foundation, when the actual evidence was not available

Prior to trial, after a hearing and thorough review of briefs and research, the Court granted the State's motion in limine prohibiting Defendant from introducing evidence that the victim's postmortem toxicology screen revealed the presence of cocaine. Defendant failed to demonstrate the offered testimony was relevant or based upon a technique that had reached a stage of verifiable scientific certainty.

Prior difficulties between Defendant and his former wife were admissible to show Defendant's motive, intent or bent of mind toward the victim, who was involved in a relationship with Defendant's former wife. Hearsay statements of the victim were properly admitted pursuant to O.C.G.A. §24-3-1, the necessity exception to the hearsay rule.

Finally, the Court finds that the delay between the time of this crime and Defendant's indictment and trial, while substantial, was not deliberately caused by the State to gain a tactical advantage, but was caused by the State's ongoing investigation Defendant has not been unfairly prejudiced and his right to due process has not been violated.

After considering the arguments of counsel and based upon the entire record, it is hereby ORDERED that the motion for new trial be DENIED on each and every ground.

SO ORDERED this 10th day of September, 2008.

S/Tom Campbell

TOM CAMPBELL,
JUDGE, SUPERIOR
COURT OF FULTON
COUNTY, A.J.C